Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

William P. Todd and Diana J. Todd,
on their own behalf and as next friends
for their son, William Matthew Todd, *et al.*,

Petitioners

v.

Rush County Schools, *et al.*,

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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6 PP

QUESTION PRESENTED FOR REVIEW

I. Does the Rush County Schools' Extracurricular Activities Drug Testing Program, under which all Rush County High School students who wish to participate in any extracurricular activity must agree to be subject to random and suspicionless urine testing for alcohol, unlawful drug, and cigarette usage, violate the Fourth Amendment rights of students who wish to participate in extracurricular activities other than athletics or cheerleading?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioners, William P. Todd and Diana J. Todd, on their own behalf and as next friends for their son, William Matthew Todd and petitioners Steve Hammons and Gina Hammons on their own behalf and as next friends for their children, Anne Hammons, Steve Hammons, Jr., and Jennifer Hammons and the respondents, Rush County Schools and Ed Lyskowinski, in his official capacity as Superintendent of the Rush County Schools.

The parties on appeal are identical. However, although Gina Hammons was identified below as the parent of the three children, this is incorrect as she is in actuality the step-mother of Anne Hammons; Steve Hammons, Jr., and Jennifer Hammons.

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No. _____

In The
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October Term 1997

William P. Todd and Diana J. Todd,
on their own behalf and as next friends
for their son, William Matthew Todd,
et al.,

Petitioners

v.

Rush County Schools, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners herein respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, dated January 12, 1998, is reported at 133 F.3d 984 (7th Cir. 1998) and is reprinted at pages A-1 through A-6 of the appendix to this petition. The Seventh Circuit's order and opinion denying Petition for Rehearing With Suggestion for Rehearing En Banc, dated March 19, 1998, is

reported at 139 F.3d 571 (7th Cir. 1998), and is reprinted at pages A-7 through A-13 of the Appendix to this Petition. The opinion of the United States District Court of the Southern District of Indiana is reported at 983 F.Supp. 799 (S.D.In. 1997) and is reprinted at pages A-14 through A-30 of the appendix to this petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit is dated January 12, 1998. The Seventh Circuit's Order denying the petition for rehearing is dated March 19, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Basis of Federal Jurisdiction in the District Court

The jurisdiction of the District Court was invoked under 28 U.S.C. §1331 because of the presentation of a federal question and 28 U.S.C. §1343 to redress the deprivation of

rights secured by the Constitution of the United States

B. Statement of the Facts

Rush County High School is the only high school in Rush County, a rural Indiana county. (A-15). The High School has 950 students. (*Id.*).

The High School offers numerous extracurricular activities for its students. In addition to athletics there is: Student Council, Student's Against Drunk Driving, French Club, Japanese Club, Spanish Club, Fellowship of Christian Athletes, Future Homemakers of America, Academic Team, Future Farmers of America Officers, Inkspots, Speech Club, Library Club, Broadcasting, Class Officers, and Athletic Council. (Exhibit 5 to Deposition of Bet Kotowski of November 20, 1996). The school recognizes that these activities are valuable since they teach social skills and may, if the student excels, assist the student with getting into college. (A-21).

In August of 1996, the Rush County High School adopted an Extracurricular Activities Drug Testing Program. (A-16; the Program is reproduced in petitioners' Appendix at A-31 through A-42). There is little evidence that any drug problem existed at the High School before the initiation of the Program. The District Court concluded that the objective evidence of problems with drug abuse in the High School was slight.

> The empirical evidence is not particularly indicative of drug, alcohol or tobacco use by a majority (or even a large minority) of the students. Also, the subjective observations are somewhat vague, interspersed with what

> appears to be a motivating view that society in general has a drug problem; this view is not necessarily incorrect, but it does not tend to indicate any specific concern about Rush County in particular. There also is very little to indicate that students in extracurricular activities are "ringleaders" of a drug rebellion . . .

(A-26). Moreover, any drug usage by Rush County High School students has had little impact on school discipline. (A-20). Since the 1992-93 school year there have been no alcohol related expulsions; between one to four drug related expulsions, and between zero to one tobacco related expulsion each year. (*Id.*).

The Program adopted by the High School nevertheless prohibits any Rush County High School student from participating in any extracurricular activity or from driving to school unless and until the student and his parent or guardian consent to the student being tested for drug, alcohol, or tobacco use in random, unannounced urinalysis tests. (A-16).

Once consent is given, the student is subject to testing at any time. (A-17). When testing is done, the testing service brings an RV type vehicle to the School and approximately twenty (20) or thirty (30) students are selected and brought to the vehicle by faculty members. (*Id.*). In the vehicles there are separate areas for male and female students. (*Id.*). The student has two minutes to produce the specimen. (*Id.*). If a student is unable to produce the sample he or she will be given an additional two hours to produce the urine specimen and if unable to do so during this time period the student will be barred from extracurricular activities pending the retest. (*Id.*).

If the result of the test is positive the student and his

family are informed and are given an opportunity to explain the result to the principal of the High School by, for example, submitting proof that the student is taking prescription medication that would produce a positive result. (A-18). Absent a satisfactory explanation, however, the student is barred from all extracurricular activities until passing a retest. (*Id.*). The positive test is reported on a "need to know" basis. (*Id.*). A positive test is to be kept confidential and is not to be used in school discipline proceedings, although it could be subpoenaed in either criminal or juvenile proceedings. (A-18 to A-19).

At the time that the case and summary judgment motions were filed, William Matthew Todd was a freshman at the High School who, before the testing program, functioned as a volunteer who videotaped the football team. (A-21). He did not wear a uniform or engage in any physical activity. (A-21). His parents originally refused to consent to the drug testing and he was barred from videotaping the team. (*Id*).[1] Mr. Todd is a retired 20 year veteran of the Rush County Sheriff's Department where, among other things, he served as an undercover officer during drug investigations. (*Id.*). He does not believe that drug problems at the High School have been

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As petitioners disclosed in their rehearing petition, subsequent to the Court of Appeals decision in this case the Todds signed the consent form to have their son randomly tested pursuant to the challenged policy. However, they continue to object to the testing and would refuse to allow their son to be tested if this would not mean his exclusion from extracurricular activities. The Hammons' have not consented to any testing. *See* Appellants' Petition for Rehearing with Suggestion for Rehearing En Banc, p.7, note 1.

William Matthew Todd will be a Junior at the High School in the 1998-99 school year.

growing worse. (*Id.*).

At the time that the case and summary judgment motions were filed Steve Hammons was the father of three children who attended the High School. (*Id*).[2] The Hammons refused to give permission for the children to be tested under the Program and as a result the three children in High School were barred from all extracurricular activities. (*Id.*). Two of the children had been participating in the Library Club and Future Farmers of America. (*Id.*).

C. Proceedings Below

The case was submitted to the District Court on cross motions for summary judgment. In granting summary judgment for the school system, the District Court concluded that there was no real difference between the non-athlete extracurricular participants in this case and the student athletes that this Court held could be tested in *Vernonia v. School District 47J v. Acton*, 515 U.S. 646 (1995). (A-27 - A-28). The District Court further concluded that all public school students have a diminished expectation of privacy and that special needs exist that justify the testing of extracurricular participants. (A-28). The special needs identified by the District Court are simply that this case involves public school students and that drugs are harmful. (A-26 to A-27). As the District Court acknowledged, "[t]he empirical evidence is not particularly indicative of drug,

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Although in her Affidavit, Gina Hammons described herself as the parent of Anne, Steven and Jennifer Hammons, she is actually their step-mother. Both Anne Hammons and Steve Hammons, Jr., have graduated from the High School. Jennifer Hammons will be a Senior at the High School during the 1998-99 school year. Additionally, Ms. Hammons' child, Jared, will be a Sophomore during the 1998-99 school year at the High School.

alcohol or tobacco use by a majority (or even a large minority) of the students." (A-26).

In affirming the District Court the Seventh Circuit found that deterring drug use among school children was an important interest for the school and that it could justify testing students who had volunteered to participate in extracurricular activities. (A-5). The Seventh Circuit found that demands of extracurricular activities required healthy students. (A-5). Finally, the appeals court found that the testing program was sufficiently similar to that approved by this Court in *Vernonia* and the Seventh Circuit in *Schaill v. Tippecanoe County School Corporation*, 864 F.2d 1309 (7th Cir. 1988), to satisfy the requirements of the Fourth Amendment.[3] (A-6).

ARGUMENT

Reasons for Granting the Petition

Plenary review in this case is appropriate because the Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law which conflicts with this Court's decision in *Vernonia* and which absolutely ignores the import of this Court's decision in *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295 (1997). As a result the Court of Appeals' decision represents a significant and unwarranted erosion of the Fourth Amendment rights of public

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Although the Court of Appeals found that the drug testing was consistent with its decision in *Schaill* the Court of Appeals does not mention that in *Schaill*, in allowing testing of student athletes and cheerleaders, the Court noted that "sports are quite distinguishable from almost any other activity. Random testing of athletes does not necessarily imply random testing of band members or the chess team." 864 F.2d at 1319.

school students.

I. The Decision Below Goes Far Beyond *Vernonia* and Invites the Expanded Drug Testing of Students Throughout the Country

In *Vernonia* this Court held that student athletes in public schools could, consistent with the Fourth Amendment, be subjected to random drug testing through urinalysis. The Court of Appeals in this case went far beyond both the holding and logic of *Vernonia* to conclude that schools can require as a condition of participation in all extracurricular activities that students be subjected to random drug screens.

School districts around the country have apparently shown a desire to expand *Vernonia* beyond its holding.[4] The

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See e.g., Matt Curry, *Perryton schools resuming drug-testing program soon*, AMARILLO GLOBE-NEWS, January 24, 1998, *available in* http://amarillonet.com (referring to pending district court litigation challenging required drug testing for all extracurricular participants in junior high school and high school in the Tulia and Farwell school districts.)

John Gibeaut, *Seeking Substances: Indiana schools push for expansion of drug testing ruling*, ABA JOURNAL, May 1998, at 42 (referring to, in addition to this case: New Jersey School Board Association policy supporting drug testing of all students; New Orleans's district attorney's proposal for mandatory drug tests for students; Miami-Dade County School District's deciding not to implement a compulsory drug testing program for all students);

Dionne Johnson, *Random drug-testing finds 1 student tests positive*, BATON ROUGE ADVOCATE, March 31, 1998, *available in* WESTLAW, 1998 WL 4893682 (Reporting as to results of drug testing of extracurricular participants)

Mike Lafferty, *Licking Valley students facing drug tests*, COLUMBUS (Ohio)

result of the Court of Appeals decision in this case will be to embolden school districts to expand student drug testing further and further away from the limits expressed in *Vernonia.* Although the Court of Appeals decision is the first of its kind in the circuits, it is not premature for this Court to grant review of this case since it concerns an issue that is alive in every Circuit, if not in every American community, and it concerns an issue that requires definitive interpretation and explication at this time.

II. The Court of Appeals' Decision Conflicts With and Misinterprets *Vernonia* and Ignores this Court's Holding in *Chandler* By Holding that Special Needs Justifying Random and Suspicionless Testing Are Present Merely Because the Students are In Public School and By Failing to Recognize that the Privacy Interests of Non-Athlete Extracurricular Participants are Significantly Greater than those of

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DISPATCH, Dec. 11, 1997, *available in* www.dispatch.com (School Board adopts policy which tests all participants in extracurricular activities which have an academic requirement)

Dustin Long, *Growing Debate*, GREENSBORO (North Carolina) NEWS & RECORD, March 13, 1998 (School Board adopts policy requiring random drug testing policy in order to participate in extracurricular activities).

ACLU sues Arkansas schools to stop random drug screening, DALLAS MORNING NEWS, November 21, 1997, *available in* WESTLAW, 1997 WL 16178980 (Lawsuit filed to challenge school district policy requiring random drug testing in order for students in 7-12 grade to participate in extracurricular activities.)

Schools in Paisley Will Begin Testing Students for Drugs, PORTLAND OREGONIAN, July 18, 1997, *available in* WESTLAW, 1997 WL 4191391 (School Board implements a drug-testing policy for seventh to twelfth graders who wish to participate in extracurricular activities).

the Student Athletes in *Vernonia*

In *Vernonia* this Court reiterated its holding from prior cases that random and suspicionless drug testing constituted a search under the Fourth Amendment, but that it could be justified if there were special needs that outweigh the privacy interests of the individuals who are to be tested. 515 U.S. at 652, 653. However, a suspicionless search is an extraordinary exception to the general rule under the Fourth Amendment that a search must generally be based on some degree of suspicion. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). This Court has emphasized that in determining whether a suspicionless search is justified "courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at --, 117 S.Ct. at 1301. Only this careful balancing can insure that Fourth Amendment rights are not violated. In *Vernonia* this Court engaged in this analysis and found that there were significant factors, aside from the fact that the student-athletes attended school, which created special needs. The District Court and Court of Appeals ignored these factors. The lower courts also ignored the fact that the privacy interests of the petitioners are significantly greater than those of the student athletes in *Vernonia*

A. The Court of Appeals decision misapplies the special needs analysis

In *Vernonia* this Court noted that deterring drug use by children in the school's custody was an important interest. 515 U.S. at 661. However, the Court found a number of additional facts which gave rise to a conclusion that special needs were present. First, this Court found in *Vernonia* that the school was faced with a drug epidemic and that student athletes were at the fore of the drug problems. 515 U.S. at 662-63. Yet, in this case

there was no drug crisis and the trial court found that there was no indication that extracurricular participants were leading a drug rebellion. (A-26). There is also no evidence here of an overall drug problem at the High School.

The Court in *Vernonia* also noted that there were special interests justifying the testing of student athletes "where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." 515 U.S. at 662. These risks were not present with regard to petitioners who were engaged in such activities as library club and videotaping the football team; neither of which activities carry a risk of physical harm.

Instead of focusing on all of these factors emphasized in *Vernonia*, the Court of Appeals found, as did the District Court, that the students' mere presence in school is a sufficient special need to support the testing. Indeed, the Court of Appeals indicates that the testing is justified by the need to protect the health of students. (A-5 to A-6). This is not a need that is special to athletes or extracurricular participants, but is an amorphous principle that could easily be used to justify the testing of all students who show up for school. This contravenes *Vernonia* and ignores the fact that this Court has specifically held in *Chandler* that various factors must go into deciding if special needs are present other than the fact that the persons to be tested are students. *Chandler*, 520 U.S. at --, 117 S.Ct. at 1302.

B. The Court of Appeals misapplied *Vernonia* by failing to recognize the numerous reasons that the extracurricular students' privacy interests here are higher than those of the athletes in *Vernonia*

Despite the fact that *Vernonia* stressed that in

determining whether random testing could occur the privacy interests of the students had to be balanced with the special needs of the school, the Court of Appeals in this case completely ignored, as did the District Court, the privacy interests of the students which are significantly greater than those in *Vernonia.*

Although all students have a diminished expectation of privacy by virtue of their status as students, this Court in *Vernonia* found that student athletes have even less of a privacy interest than other students since they are used to being seen in a state of undress and are used to extensive regulation. 515 U.S. at 656. However, non-athlete extracurricular participants, like library club members, do not strip to participate in the activity, nor are they extensively regulated. They have no diminished expectation of privacy distinct from students who are merely attending classes and who are not participating in any extracurricular activities.

The Court of Appeals does note that, like the student athletes in *Vernonia,* the extracurricular participants at Rush County High School have volunteered to participate in the extracurricular activity. But, volunteering to participate in a school activity does not operate as a Fourth Amendment waiver. In *Chandler,* this Court did not hold that choosing to run for public office waived a citizen's right to object to a State imposed urine test. In *Vernonia,* as in *Skinner v. Railway Executives Association,* 489 U.S. 602 (1989), the significance of the voluntary nature of the activity is that the individuals voluntarily engaged in a highly regulated activity which carried with it a diminished expectation of privacy. Although participation in non-athletic extracurricular activities is voluntary, it does not carry with it a diminished expectation of privacy.

C. The erroneous holding of the Court of Appeals should be reviewed

Vernonia and *Chandler* both call for a reasoned analysis focussing on the particular facts present to support claims of special needs and to analyze the privacy interests of those to be tested. The Court of Appeals ignores this analysis and instead concludes that the students' status as students and the general need to assure healthy students is enough to justify the testing. This is erroneous. As Judge Ripple, in dissenting from the denial of rehearing in this cause, noted:

> Because of the broad-brushed reading of *Vernonia* embraced by the panel, its decision takes us a long way toward condoning drug testing in the general school population. . . By avoiding *Chandler's* emphasis on the need to define with particularity the group for which testing is justified, the panel opinion has left the jurisprudence without any guiding principle to protect against the sort of general search that, from the beginning of the Republic, had been the principal concern of the Fourth Amendment.

(A-11). It is impossible to reconcile the Court of Appeals' expansive holding with this Court's often quoted statement that children do not "shed their constitutional rights . . . at the schoolhouse gate . . ." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). Instead, the decision in this case requires that all school children leave their Fourth Amendment rights to be free from random and suspicionless searches at the door when they enter school each day. This holding will lead to school districts all over the country implementing random testing programs which go far

beyond *Vernonia* and which will threaten the Fourth Amendment rights of all students. The Court of Appeals decision is an erroneous and dangerous holding and it should be reviewed so that the exception created by *Vernonia* does not swallow the rule as explicated in *Tinker*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 97-2548

WILLIAM P. TODD and DIANA J. TODD,
on their own behalf and as next friends
for their son, WILLIAM MATTHEW TODD,
STEVE HAMMONS, et al.,

Plaintiffs-Appellants,

v.

RUSH COUNTY SCHOOLS and ED LYSKOWINSKI,
in his official capacity as Superintendent of the
Rush County Schools,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 96 C 1417—John D. Tinder, *Judge.*

ARGUED NOVEMBER 6, 1997—DECIDED JANUARY 12, 1998

Before CUMMINGS, MANION and EVANS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This suit was filed by four parents and as next friends for their four children, all students at Rushville Consolidated High School in Rushville, Indiana. In August 1996, the Rush County School Board approved a program prohibiting a high school student from participating in any extracurricular activities or driving to and from school unless the student and parent or guardian consented to a test for drugs, alcohol or tobacco in

random, unannounced urinalysis examinations. Extracurricular activities include athletic teams, Student Council, Foreign Language Clubs, Fellowship of Christian Athletes, Future Farmers of America Officers and the Library Club. When consent for testing is given, participation in the extracurricular organizations or driving to and from school are permitted. The testing is conducted by Midwest Toxicology Services, which collects the samples, and the Witham Hospital Laboratory Services, which performs the analyses. The $30 test is paid for by a grant.

If a test result is positive, the student and family are informed and permitted to explain the result by showing, for example, that the student is taking a medication that would influence the result. Without a satisfactory explanation, the student is barred from extracurricular activities or driving to and from school until passing a retest. However, a positive test result is not to be used in school discipline proceedings. If a student tests positive, the student and his or her parents will be given the names of agencies that might assist the student's recovery. Also if a student tests positive, he or she may request a new urine test. Otherwise the student may be retested after an appropriate interval but will continue to be barred from extracurricular activities and driving to and from school until testing negative.

This program concerns random suspicionless testing. The high school does reserve the right to test any student if it has reasonable suspicion of drug use. If a student tests positive twice, the school is deemed to have reasonable suspicion justifying further retests even though the student will no longer be permitted to engage in any extracurricular activities due to the prior positive results. Tests based on reasonable suspicion, unlike the suspicionless tests, do subject the student to school discipline.

This case was initiated by the students' and parents' complaint and activated by their motion for summary judgment which was denied. In turn, the defendants Rush County Schools and its superintendent filed a motion for summary judgment, which was subsequently granted.

When the summary judgment motions were filed in the trial court, random tests had been performed on five or six occasions involving 20 to 30 students each time. Five to eight students tested positive, three or four for marijuana and the rest for nicotine. From 1992 to 1997 there were no alcohol-related expulsions, zero to one tobacco-related expulsion per year, and one to four drug-related expulsions. Expulsions are not involved in the rule being challenged here. As to suspensions, there were two to nine for alcohol, 21 to 44 for tobacco, and one to nine for drugs.

A 1994 survey of Rush County high school students was conducted by the Indiana Prevention Resource Center and disclosed that cigarette use for Rush County 10th graders was higher than the Indiana average and that alcohol use for 11th and 12th graders was also higher than the state average. Marijuana usage was lower for 9th and 12th graders than the state average. Two witnesses stated that drug use has been increasing at the high school, causing the drowning of a senior and an automobile crash where the students were inhaling the contents of aerosol cans.

As the opinion below reveals, there were 950 students in the Rush County High School for the 1996-1997 school year. Seven hundred twenty-eight agreed to sign with the drug testing program. Of those, 170 did not participate in extracurricular activities (including athletics) or drive to and from school. Plaintiff William Todd's parents refused to sign a consent form for the drug testing program, resulting in his being barred from videotaping the football team. Likewise, the parents of the three plaintiff Hammons children refused to sign the consent form and the children are therefore barred from participating in any extracurricular activities. One of the Hammons children had been a member of the Library Club and another a member of the Future Farmers of America.

The issue before this Court is whether Rush County Schools' drug testing program under which all students who wish to participate in extracurricular activities must consent to random and suspicionless urine testing for alcohol,

unlawful drug, and cigarette usage violates the Fourth Amendment rights of those students.[1] For the following reasons, we hold that Rush County Schools' drug testing program is consistent with the Fourth Amendment.

The outcome of this case is governed by *Vernonia School District 473 v. Acton*, ___ U.S. ___, 115 S. Ct. 2386, and *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988).[2] Those cases upheld random urinalysis requirements for students who participate in interscholastic athletics. As in those cases, the testing policy was undertaken in furtherance of the school districts' "responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[3] 115 S. Ct. at 2396. Noting that "Fourth Amendment rights * * * are different in public schools than elsewhere," *id.* at 2392, the Supreme Court in *Vernonia* determined that deterring drug use by students was a compelling interest, finding that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* at 2394.

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[1] As previously noted, the drug testing program at Rush County High School also required that students who were driving to and from school be subject to random, suspicionless testing. Because the plaintiffs in this case were all students who wished to participate in extracurricular activities without having to consent to random, suspicionless drug testing, this Court expresses no opinion as to whether the aspect of the drug testing program which requires students who are driving to and from school to consent to drug testing is constitutional.

[2] In *Schaill*, the urine testing program involved both athletes and cheerleaders.

[3] The Supreme Court stated that "[c]entral, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." *Id.* at 2391. "When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status." *Id.*

As defendants explained, similar to the program in *Vernonia*, their program was designed to deter drug use and not to catch and punish users. The difference between the cited cases and the present one is that here the testing is also required of those engaging in other extracurricular activities. However, we find that the reasoning compelling drug testing of athletes also applies to testing of students involved in extracurricular activities. Certainly successful extracurricular activities require healthy students. While the testing in the present case includes alcohol and nicotine, that is insufficient to condemn it because those substances may also affect students' mental and physical condition.

Additionally, while recognizing that extracurricular activities "are considered valuable to the school experience, and [that] participation may assist a student in getting into college," the district judge noted that extracurricular activities, like athletics, "are a privilege at the High School" (Op. 9). In *Schaill*, this Court found significant "the fact that [the] plaintiffs are required to submit to random drug testing only as a condition of participation in an extracurricular activity," in that case athletics. *Schaill*, 864 F.2d at 1319. Similar to *Schaill* and *Vernonia*, the Rush County Schools' drug testing program applies only to students who have voluntarily chosen to participate in an activity. As the district court also noted, students in other extracurricular activities, like athletes, "can take leadership roles in the school community and serve as an example to others" (Op. 14). As this Court has reasoned, "[p]articipation in interscholastic athletics is a benefit carrying with it enhanced prestige and status in the student community" and thus "[i]t is not unreasonable to couple these benefits with an obligation to undergo drug testing." *Schaill*, 864 F.2d at 1320. Therefore it is appropriate to include students who participate in extracurricular activities in the drug testing.

The linchpin of this drug testing program is to protect the health of the students involved. As we have stated, "[t]he plague of illicit drug use which currently threatens our

nation's schools adds a major dimension to the difficulties the schools face in fulfilling their purpose—the education of our children. If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment." *Schaill,* 864 F.2d at 1324. We conclude that Rush County Schools' drug testing program is sufficiently similar to the programs in *Vernonia* and *Schaill* to pass muster under the Fourth and Fourteenth Amendments.

Judgment Affirmed.

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—1-12-98

In the

United States Court of Appeals

For the Seventh Circuit

No. 97-2548

WILLIAM P. TODD and DIANA J. TODD,
on their own behalf and as next friends
for their son, WILLIAM MATTHEW TODD,
STEVE HAMMONS, et al.,

Plaintiffs-Appellants,

v.

RUSH COUNTY SCHOOLS and ED LYSKOWINSKI,
in his official capacity as Superintendent of the
Rush County Schools,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 96 C 1417—John D. Tinder, *Judge*.

On Petition for Rehearing En Banc

SUBMITTED JANUARY 29, 1998—DECIDED MARCH 19, 1998

Before POSNER, *Chief Judge*, and CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD and EVANS, *Circuit Judges*.

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by plaintiffs-appellants and the answer of defendants-appellees, all of the judges

on the original panel voted to deny rehearing and a majority of the judges in active service voted to deny rehearing en banc. Judge Kenneth F. Ripple dissented from the denial of rehearing en banc and filed an opinion which was joined by Judge Ilana Diamond Rovner. Judge Diane P. Wood dissented from the denial of rehearing en banc and filed an opinion which was joined by Judge Joel M. Flaum.

The petition for rehearing is denied.

RIPPLE, *Circuit Judge*, with whom ROVNER, *Circuit Judge*, joins, dissenting from the denial of rehearing en banc. This case presents an important and recurring issue with respect to the scope of suspicionless drug testing of children enrolled in public schools. Because the panel decision gives a very broad reading to the Supreme Court's holding in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), and seemingly fails to take fully into account the Supreme Court's holding in *Chandler v. Miller*, 117 S. Ct. 1295 (1997), further review is warranted if we are to avoid sanctioning, by implication, the use of a urine sample as the price of admission to the public schools in this circuit.

At issue in this case is a suspicionless drug testing program for all students who wish to participate in any extracurricular activity offered by the school. Students who wish to participate in such activities as foreign language clubs, the Future Farmers of America or the Library Club must agree to submit to drug testing as a precondition of their participation. In *Vernonia*, the Supreme Court articulated the basic approach to suspicionless drug testing: The reasonableness of the search is to be determined by balancing the intrusion into a person's Fourth Amendment interests against the promotion of legitimate governmental interests. *See* 515 U.S. at 652-53. *Vernonia* involved a relatively

straightforward situation, a drug testing program for student athletes. In examining the privacy interests at stake, the Court began its analysis by noting that the subjects of the test were school children who were committed to the temporary custody of the state as schoolmaster and therefore expected to be subjected to certain physical examination and inoculation requirements as a condition of their enrollment in the institution. The Court then proceeded to stress that student athletes have a lesser degree of privacy as part of their participation in athletics. Indeed, the Court detailed the locker room arrangements and the need for adherence to other training rules that impinge even more on their expectation of privacy. *Id.* at 657. The Court also noted that the process for obtaining the sample was not very intrusive and that the testing methodology was limited to the identification of controlled substances.

When the Court turned to the nature of the governmental interest, it mentioned the general concern of deterring drug use among youth. It then focused on the particular need to test the athletes. "[I]t must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." *Id.* at 662. The Court then noted the "state of rebellion" that existed in that particular student body, especially among those involved in athletics. *Id.* at 663. Moving to the efficacy of the means chosen by school authorities to address the problem, the Court noted the "role model" effect of athletes and indeed recognized the wisdom of testing this select group as opposed to the entire student body. *Id.*

Vernonia is susceptible to several different interpretations: (1) that "special needs" justifying drug testing always exist in the public school context, and thus school authorities may require drug testing for any reason including controlling access to core classes, *see, e.g.*, *id.* at 656; (2) that it is necessary to show a particularized govern-

mental need to impose drug testing on a particular student population, *see, e.g.*, Vernonia's "state of rebellion"; (3) that drug testing is permitted in special scholastic environments in which the need is well identified and the privacy expectations are diminished, *see, e.g., id.* at 657.

Chandler, in striking down a drug testing program for candidates for state office, emphasized that the state had not demonstrated a need for suspicionless searches of the defined group. The targeted group had not been found to have a high degree of drug use, nor did the group, as it was defined by the statute, perform highly sensitive safety-related tasks that required this scrutiny.

This case involves an attempt by a school district to subject to suspicionless testing a much broader group than the student athletes involved in the drug testing program in *Vernonia*. The interests of the Rush County school district are substantially different from the ones at stake in *Vernonia*. There is, of course, the residual interest of the district in protecting students from illicit drugs. But, unlike the situation in *Vernonia*, there is no showing of a particularized need because of a "state of rebellion" in the school, and certainly no showing that the targeted group, all students participating in any extracurricular activity, presents a particularized need. In short, the teaching of *Chandler* that the group be defined in terms that demonstrate the government's special need for such testing is markedly absent unless the Supreme Court intended in *Vernonia* that all school children are subject to testing all of the time.

The panel does not explicitly adopt such a broad-stroke reading of *Vernonia*. Yet, it frankly admits that it condones the suspicionless testing of a great part of the student body. Even more significantly, the panel's formula permits this widespread testing on the ground that "successful extracurricular activities require healthy students." *Todd v. Rush County Schools*, 133 F.3d 984, 986 (7th Cir. 1998). This rationale admits of no principled limitation. Certainly,

physics class, math class or any other part of the school's academic endeavor also requires "healthy students." The assertion that students in extracurricular activities can take leadership roles in the schools and the community is a generality that does little to define, with the particularity suggested by *Chandler*, a group that needs to be tested. Indeed, in *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1322 (7th Cir. 1988), this court rejected explicitly the suggestion that athletics and other school activities were similarly situated with respect to the need for suspicionless drug testing.

Finally, the panel notes that participation in the extracurricular programs is a privilege and participation is voluntary. In *Schaill*, this court noted that the fact that the consent to drug testing was limited only to athletic programs and therefore could be avoided simply by refraining from participating in the program ought to be weighed in assessing the reasonableness of the search. Here, by contrast, the requirement affects a much broader aspect of student life. Exclusion of a high school student from all extracurricular activities deprives that student of a great deal of what the modern American high school has to offer in terms of academic and personal development.

Because of the broad-brushed reading of *Vernonia* embraced by the panel, its decision takes us a long way toward condoning drug testing in the general school population. The principal reason given for permitting this program—that the demands of extracurricular activities require healthy students—is as true for scholastic matters as it is for extracurricular activities. By avoiding *Chandler*'s emphasis on the need to define with particularity the group for which testing is justified, the panel opinion has left the jurisprudence without any guiding principle to protect against the sort of general search that, from the beginning of the Republic, had been the principal concern of the Fourth Amendment.

DIANE P. WOOD, *Circuit Judge*, with whom JOEL M. FLAUM, *Circuit Judge*, joins, dissenting from the denial of rehearing en banc. That a panel of this court may have arrived at the correct outcome in a case should only begin our inquiry into whether that case warrants rehearing en banc. The corollary to the recognized proposition that "mere" error of a panel does not merit reconsideration en banc is that certain cases raise recurring, important issues of law that deserve our attention, regardless of the panel's approach.

In *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), the Court upheld a school's policy of randomly drug testing students who voluntarily participated in interscholastic athletics. The Court focused on a variety of factors—that high school athletes have and expect a lesser degree of privacy than other students, *id.* at 657; that there was a drug crisis in the Vernonia school district, with evidence that students participating in high school athletics were at its core, *id.* at 662-63; that drug use by participants in athletics puts both the user and other athletes at substantial risk of physical harm, *id.* at 662; and that "Fourth Amendment rights . . . are different in public schools than elsewhere." *Id.* at 656, 665. Depending on which of these one stresses, *Vernonia* can be read in varying ways. Was the crucial factor the established drug crisis, and the narrow focus on its leaders? A careful balance between the intrusiveness of this specific search and all factors adding to its acceptability? *Cf. Chandler v. Miller*, 117 S. Ct. 1295, 1301 (1997). Unique aspects of student athletics? A distinction between extracurricular activities and those required of all? *Cf.* the panel's opinion, 133 F.3d 984, 986 (7th Cir. 1998). Or that public schools are different, so different that randomized searches of all students would be acceptable? But see *Vernonia*, 515 U.S. at 666 (Ginsburg, concurring) (interpreting the majority's opinion as reserving this question).

Each of these possible interpretations of *Vernonia* is plausible; none clearly trumps the others. The only thing

that is clear is that we cannot simply say "see *Vernonia*" and leave it at that. The constitutionality of drug testing in the schools is a problem that will recur, and the legal interpretation of *Vernonia* we adopt will often be outcome determinative. Because I believe that the clarification and refinement of the *Vernonia* legal standard is a task well worth the full court's attention, I respectfully dissent from the denial of rehearing en banc.

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—3-19-98

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WIILIAM P. TODD and DIANA J. TODD, on their own behalf and as next friends for their son, WILLIAM MATTHEW TODD; STEVE HAMMONS and GINA HAMMONS, on their own behalf and as next friends for their children ANNE HAMMONS, STEVE HAMMONS, JR. and JENNIFER HAMMONS,	)	
Plaintiffs,	)	
vs.	)	IP 96 1417-C-T/G
RUSH COUNTY SCHOOLS; ED LYSKOWINSKI, in his official capacity as Superintendent of the Rush County Schools,	)	
Defendants.	)	

ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the court on Plaintiff's motion for summary judgment under FED. R. CIV. P. 56, and Defendant's motion for summary judgment under the same rule. The court, having considered the motions and supporting briefs,

now finds that the Plaintiff's motion should be **DENIED**, and the Defendants' motion **GRANTED**.

I. Background Facts and Procedural History

Plaintiffs filed suit on October 3, 1996, claiming a violation both of the Fourth Amendment and the analogous provision of the Indiana Constitution. The case moved quickly through discovery, and the relevant facts stated below were developed. These facts are uncontested.[1]

Rush County is a rural county in Indiana with Rushville (Pop. 6000) as the largest community. There are four elementary schools, one middle school, and one high school which are the public schools for the county. The six schools combined have 3009 students. The high school, Rushville consolidated High School ("High School"), has 950 students. It covers grades 9 through 12, and is the only high school in the county.

For some time, the High School has had an athletic code in place which suspends school athletes from participation if they use alcohol, tobacco, or illegal drugs, or are arrested. For the 1996-97 school year, 30 athletes were suspended under this code. Most of these were alcohol and tobacco-related. Smoking is apparently not allowed at the High School.

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1 The Plaintiffs filed a motion to strike various matters submitted by the Defendants in connection with their reply brief. For the most part, the Plaintiffs correctly identified defects in this submission, therefore, the motion to strike is **GRANTED**. The objectionable portions of the Bet Kotowski affidavit were not considered in connection with this entry.

In 1980, the Rush County Local Coordinating Council for Safe and Drug-Free Schools and Communities("LCC") was established, partly motivated by state initiatives. The LCC currently has 67 members, including representatives from the county courts, Family an Children's Services, police, and schools. The LCC is funded mainly through fines imposed by the county courts. The LCC is charged with studying the use of drugs in Rush County, and with providing goals and solutions for reducing drug use in the county.

John Wilson ("Wilson") is the Athletic Director of the High School and has been working at the school since 1970. In recent years, he has come to believe that there is a growing problem with drugs at the school. Around 1995, he began to collect information from other school systems in order to develop a proposed drug testing program ("Program") at the high School. This plan was presented to the LCC, which agreed to provide funding for the Program. The Program was reviewed by the Rush County School Board ("Board") in public meetings. There was minimal opposition voiced to the Program at these meetings.

The Board approved the program in August of 1996, and it became effective in October of 1996. The terms of the Program prohibit a High School student from participating in any extracurricular activity or driving to school unless the student and parent or guardian consent to a test for drugs, alcohol, or tobacco in random, unannounced urinalysis exams. "Extracurricular activity" is defined to include not just athletic teams, but all extracurricular clubs such as the Student Council, Fellowship of Christian Athletes, and the Library Club. Students who want to drive to school are also covered by the

Program.[2] Once consent is given, participation in these organizations is allowed, and students may be subject to testing at any time. The testing is conducted by Midwest Toxicology Services ("Midwest"), which collects samples, and the Witham Hospital Laboratory Services ("Witham"), which performs the actual analysis. The initial test is paid for by the LCC grant. Each test costs approximately $30.

The tests are conducted in the following way: an RV-type vehicle is brought to the High School. The vehicle has separate areas for males and females. The selected students (around twenty to thirty for each test) are escorted to their respective areas by faculty members. They go into a private space and produce a urine sample. The private area contains only a stool which contains a liquid treated to prevent tampering. Students have two minutes to produce a sample. If a student is unable to urinate, twenty-four ounces of liquid is provided for the student to drink, and an additional two hours are allowed to produce a sample. If a student is still unable to urinate, the student is barred from extracurricular activities pending a retest.

Once a sample is produced, the student gives it to the employees of Midwest, who seal the sample and have the student initial it. Students are supervised at all times except for the time they are in the private area. Midwest then delivers the

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2 Through popular literature and the news media, the court is aware that there is a growing trend to require breathalyser tests for school functions such as dances. However, in this case, the Program does not appear to require testing for attendance at school functions such as dances. This type of testing is therefore not currently before the court.

samples to Witham, which analyzes the samples. Witham tests for amphetamines, barbiturates, benzodiazephines (such as Valium and Librium), cocaine, opiates, PCP, marijuana, alcohol, and nicotine. Testing is done on an Emit Immunoassay instrument which has an accuracy rate of greater than 95%. If there is an initial positive detection, the sample is immediately retested using gas chromatography, which has a better than 99% accuracy. The tested-for substances all have different detection periods, ranging from alcohol, which leaves the body in a matter of hours, to marijuana, which may take up to thirty days.

Test results are returned to the school in two or three days. If the test result is positive, the student and family are informed and given an opportunity to explain to the principal the result(for example, by producing a student's prescription medication that would cause the positive test). Without an explanation, the student is barred from extracurricular activities until a retest is passed. Positive test results are reported to persons in charge of extracurricular activities only on a need-to-know basis.

After a positive test result, a student can immediately request a new urine test at the student's own expense. The alternative is for the student to be retested after an interval of time, typically when Midwest returns for the next testing session. This retest is at the school's expense. A positive result on the retest results in a continuing prohibition from participation in extracurricular activities until the student tests negative. However, a student is only permitted one retest paid by the school system. All subsequent retests are at the student's expense.

Positive test results are kept confidential, except as noted above. They are not to be used in school disciplinary

proceedings; however, they could be subpoenaed in criminal or juvenile proceedings. The stated goal of the Program is to provide help for those who test positive. If a student has a positive test result, parents or guardians are given names of agencies that may be able to assist the student.

The High School does reserve the right to test any student at any time if it has reasonable suspicion of drug use. The positive tests under the Program are deemed to be reasonable suspicion. Therefore, a student who tests positive twice may be retested at any time; tests based on reasonable suspicion, unlike Program tests, do subject the student to school discipline.

Since the implementation of the Program, five or six random tests have occurred, involving roughly twenty to thirty students each time. In the first three tests, three to five students per test had positive results. Since then, only two to three students have tested positive. Out of all the positive test results, three or four students tested positive for marijuana; the remainder tested positive for tobacco.

The motivation for implementing the Program is stated to be concern about the use of these substances by students, but the particulars of the origin of that concern are somewhat sketchy. Both Wilson and assistant superintendent Bet Kotowski ("Kotowski"), who is in charge of the Program, cited a subjective perception that drug use was growing among the students of Rush County. They also cited a general concern of rising drug use in society. In addition, they cited a few discrete incidents. In the 1970s a senior on the track team drowned on a school trip due to suspected alcohol use. More recently, an automobile crash involving Rush County High School students occurred during a summer vacation when students in the car were "huffing", which is the inhaling of contents from aerosol

cans. The Defendants have also mentioned the arrests in April of this year of six current and former High School students for drug dealing. However, this final incident occurred after the implementation of the Program, and is not considered as relevant.

The empirical data available in the case is somewhat slight. A list of expulsions and suspensions was submitted for the years 1992 to the present. When broken down by category and year, the data shows that for each school year, there have been no alcohol-related expulsions, between zero to one tobacco-related expulsion per year, and between one to four drug-related expulsions per year. There have been two to nine alcohol-related suspensions per year, twenty-one to forty-four tobacco-related suspensions per year, and one to nine drug-related suspensions per year. There is no consistent increase or decrease in numbers over the years, with numbers in all categories fluctuating from year to year.

A 1994 survey of drug and alcohol use in Rush Country(sic) was also submitted. This survey indicates that statistically significant findings for the year were that: (1) Daily and monthly cigarette use for Rush County 10th-grade students was higher than state rates, which were higher than national rates; (2) the monthly and annual use of alcohol was lower than state rates for 9th-grade students, but higher than the state rates for 11th-grade students; (3) annual, lifetime, and daily marijuana use among 9th and 12th grade students was lower than the state rates, and; (4) states rates overall tend to be lower than national rates, with tobacco use being a notable exception.

There are 950 students at the High School for the current school year. Of these, 728 signed with the Program. Of the 728, 170 neither participate in extracurricular activities nor drive to school. Plaintiff William Matthew Todd ("Todd") is

currently a freshman at the High School. Before the effective date of the Program, Todd was a volunteer videotaping the football team (he was not actually a football player). His parents refused to sign the consent form for the Program, and as a result he has been barred from videotaping the football team.[3] Plaintiffs Anne Hammons ("Anne"), Steve Hammons, Jr. ("Steve"), and Jennifer Hammons ("Jennifer") are also students at the High School. Anne is a senior, and was a member of the Library Club. Steve is a junior who was in the Future Farmers of America. Jennifer is a sophomore, and has not yet participated in any extracurricular activities, but may wish to in the future. All three cannot currently participate in any extracurricular activities due to their parents' refusal to sign the consent form for the Program.

Extracurricular programs are a privilege at the High School. However, they are considered valuable to the school experience, and participation may assist a student in getting into college. Approximately 40% of High School graduates go an to attend college.

II. Standard for Summary Judgment

The Seventh Circuit stated the standard for summary judgment in *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971(7th Cir. 1996):

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3 Interestingly, Todd's father is a recently retired 20-year veteran of the Rush County Sheriff's Department, where he served, among other duties, as an undercover officer in drug investigations. He has stated that he does not believe that drug problems at the High School have grown worse in the last five years.

> Under FED. R. CIV. P. 56(c), summary judgment is warranted only if "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law."
>
> The initial burden of production rests with the moving party to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323,106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting FED. R. CIV. P. 56(c)). Once the moving party satisfies this burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e).

Id. at 978. If there is no genuine issue of material fact, as in this case, the only question is whether the moving party is entitled to judgment as a matter of law. *Miranda v. Wisconsin Power & Light Co.* 91 F.3d 10111, 1014 (7th Cir. 1996).

III. Discussion

This case presents a classic constitutional battle. At issue is a pure decision of law, namely whether random drug testing of students involved in any extracurricular activity violates the Fourth Amendment right (and analogous Indiana constitutional right) to be free of unreasonable searches and seizures. The federal question will be addressed first, and, as

will be seen, the result on that issue will make it unnecessary for the Indiana constitutional question to be reached.

There are some baselines to set out. First, it is without question that students do not "shed their constitutional rights... at the school-house gate." *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969). Second, it is also clear that students are entitled to somewhat less stringent protection of their rights in a school setting; for example, schools need only have "reasonable suspicion" in order to perform a traditional search and seizure. *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985). Third, it is clear that the urinalysis drug-testing program qualifies as a "search" regulated by the Fourth Amendment. *Chandler v. Miller*, 117 S.Ct. 1295, 1300 (1997); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989).

Normally, to be a "reasonable" search under the Fourth Amendment, individualized suspicion is required. As the Supreme Court recently stated, however:

> To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing....But particularized exceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement."... When such"special needs"-- concerns other than crime detection-- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties

Chandler, 117 S.Ct. at 1301 (citations omitted). This exception was applied to the school context once before by the Supreme

Court, in the case of *Vernonia School District 47J v. Acton*, 115 S.Ct. 2386 (1995). It is this case which is the focus of conflict between the two parties.

In *Vernonia*, the Court evaluated the constitutionality of a random drug-testing requirement for students who wanted to participate in athletic events. Students who did not allow themselves to be tested could not participate in athletic events. *Vernonia*, 117 S.Ct. at 2389. The program had been motivated by the observed "sharp increase" in disciplinary problems due to drug use. *Id.* The student body was in a "state of rebellion," and this was being led primarily by members of the athletic clubs. *Id.* The coinciding of a nearly three-fold increase in disciplinary problems, plus direct observation by the staff, indicated that there was a problem of "epidemic proportions." *Id.* In addition, there had been several recent incidents of accidents and injuries in athletic competition due to drug use. *Id.*

The Court ruled that the drug testing program for student athletes did not violate the Constitution, citing a number of factors. First, the Court noted that the privacy interest of public school children was significantly less than that of the regular population. *Id.* at 2392. The Court pointed out that the schools stand as "in loco parentis," and that public school children are regularly subjected to physical examinations of various kinds. *Id.* at 2391-92. The court went on to point out that privacy concerns were even smaller in the case of student athletes, who give up considerable privacy (e.g., the locker-room shower) in order to participate in their sport. *Id.* at 2392-93. The Court also noted that high school athletics are heavily-regulated activities, which the student athletes volunteer to join. *Id.* at 2393. Finally, the court noted that there was a particular danger involved in drug use by student-athletes, namely the increased possibility of injury during physical activity. *Id.* at

2395.

The Program in this case is essentially identical to the one in *Vernonia* , with one key difference: the program applies to all extracurricular activities, not just athletics. The Defendants have seized on the closeness of the program to *Vernonia* as a justification of its constitutionality, and seek to use the "in loco parentis" rationale to extend coverage to all extracurricular activities.[4]

The Plaintiffs offer two arguments. First; they argue that there is no evidence of a drug crisis in this case similar to the one in *Vernonia*. In support of this, they cite the discussion of *Vernonia* in the recent *Chandler* decision, and the pre-*Vernonia* decision of *Brooks v. East Chambers Consolidated Ind. Sch. Dist.*, 730 F.Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991). Second, they argue that the difference in the programs-- student athletes versus all extracurricular participants--renders the Program unconstitutional, at least as it applies to the non-athletic extracurricular participants. In support of this, the Plaintiffs point to the athletic-specific language in *Vernonia*, and the Seventh Circuit case of *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988).

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3 In fact, the Defendants suggest, and submit law review articles arguing, that the rationale behind *Vernonia* would allow for the testing of the entire student population. However, that scenario is not before this court, just as it was not before the *Vernonia* court. The only question is whether such a testing regime can be applied to students wishing to participate in extracurricular activities.

Unfortunately for the Plaintiffs, both arguments come up somewhat short after a careful review of the *Vernonia* decision. Turning to the first argument, it is true that the Defendants have not shown a level of drug involvement equivalent to that of the *Vernonia* school. The empirical evidence is not particularly indicative of drug, alcohol or tobacco use by a majority (or even a large minority) of the students. Also, the subjective observations are somewhat vague, interspersed with what appears to be a motivating view that society in general has a drug problem; this view is not necessarily incorrect, but it does not tend to indicate any specific concern about Rush County in particular. There is also very little to indicate that students in extracurricular activities are "ringleaders" of a drug rebellion, as in *Vernonia*.

If this were a case like *Chandler*, where the state of Georgia was attempting to create out of whole cloth a "special need" for the testing of adult political candidates, such evidence may not be sufficient to show that need. *Chandler*, 117 S.Ct. at 1303. If the leading precedent on this question was the Brooks case, the evidence may also be insufficient, as that case required a showing that extracurricular participants were more likely to use drugs or that students were being injured by drug use. *Brooks*, 730 F.Supp. at 764. However, the controlling precedent is *Vernonia*, and that case indicates that the evidentiary hurdle for a public school is lower than in other contexts. The court states generally that, "We have found such "special needs" to exist in the importance of "[d]eterring drug use by our Nation's schoolchildren," noting that the impact of drugs on children heightened the already high concern over drug use in general. *Id.* at 2395. The Court then went on to state:

> The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities,

> under a public school system, as guardian and tutor of children entrusted to its care....when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.

Id. at 2396-97. The Court noted that, as in this case, there was no significant opposition to the drug testing program by the community during its planning phases. *Id.* at 2397. Accordingly, the evidence presented, while perhaps not rising to raging epidemic levels, can support a finding that there was a "special need" for the Program in Rush County. There is no minimum triggering point of substance abuse (such as ten percent or fifty percent of the student population) that must be met to justify the "important enough" interest on the part of the school system discussed in *Vernonia*. Some use of these prohibited substances by youth may give rise to legitimate concern about the potential for a rapid increase in abuse, if unchecked.

This leaves the Plaintiff's second argument, that the extension of this particular Program to cover all extracurricular activities renders it unconstitutional. It is true that *Vernonia* contains language that points out special aspects of athletics that influence the issue: for example, the lack of privacy, the possibility of injury, and the voluntary submission to a heavily-regulated activity. It is also true that the Seventh Circuit in deciding a 1988 case essentially identical in facts to Vernonia, stated that, "we believe that sports are quite distinguishable from almost any other activity. Random testing of athletes does not *necessarily* imply random testing of band members or the chess team." *Schaill*, 864 F.2d. at 1319 (emphasis added).

In the end, however, any perceived differences between student athletes in *Vernonia* and the non-athlete extracurricular

participants in this case turn out to be more ethereal than real. As the court in *Vernonia* stated *all* public school students have a diminished expectation of privacy; the Court simply pointed out that athletes have even lower expectations. Furthermore, the possibility of injury is not simply isolated to athletic activity. While the possibility of injury is exacerbated in athletic activity, it is not isolated only to those situations; for example, those students who drive to school under the influence of drugs may face an even greater threat of injury than might an athlete on the field. Certainly, Rush County school system has some responsibility for the health and safety of its students during all extracurricular activities (and while traveling to school). While chess or debate matches may seem to pose little risk of physical harm, traveling to and from them can include risks exacerbated by drug or alcohol use. Finally, while perhaps not to the level of being regulated by the Indiana High School Athletic Association, extracurricular activities, like sports, are voluntary activities which submit the students to extra rules and regulations. Participation in extracurricular programs is voluntary and a privilege; any student joining these activities is subject to regulation beyond that of a non-participant. Also, much like athletes, students in other extracurricular activities can take leadership roles in the school community and serve as an example to others. Being elected class president may put a student in a venerated position, much like that of a star athlete. In fact, the same could be said of any student who participates and excels in any extracurricular activity. Thus, the school has an interest in the conduct of those who may serve as an example to others. In the final analysis, the reasoning of *Vernonia* seems to hold true for any student is a member of an extracurricular activity. The Court simply pointed out these reasons were especially applicable to student athletes. Accordingly, the Defendants motion for summary judgment as to the Fourth Amendment claim is **GRANTED**, and the Plaintiff's motion for

summary judgment on this claim is **DENIED**.[5]

This leaves the Indiana Constitution, which the Plaintiffs argue offers greater protection against search and seizure. How much greater is not made clear. In any event this is not an issue that this court has to decide, especially when the issue would be better decided by an Indiana court. At the outset of this case, the court had original jurisdiction pursuant to 42 U.S.C. Sec. 1983, thus giving the court, by authority of 28 U.S.C. Sec 1367(a), supplemental jurisdiction over Plaintiff's state law claim. However, because the court will grant Defendant's motion for summary judgment and dismiss the Sec. 1983 claim, original jurisdiction is now lacking and Plaintiff's supplemental claim against the Defendants may be properly dismissed pursuant to 28 U.S.C. Sec. 1367(c)(3). Accordingly, the court chooses to exercise its discretion under 28 U.S.C. Sec. 1367(c)(3), and hereby **DISMISSES WITHOUT PREJUDICE** Plaintiff's state law claim against Defendants. Plaintiffs should note that they have up to thirty days from the date of this order during which they may re-file in the appropriate state forum. 28 U.S.C. Sec. 1367(d).

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5 The Plaintiffs allude (in their brief at page 20, n.4) to the potential overbreadth of the Program regarding tobacco, in that some of the students may be over the age of 17, thus, their use of tobacco off school grounds may not be illegal. However, that argument was not developed, and, while one of the Plaintiffs(Anne) is 18, the factual submissions did not justify considering that potential in this case. Therefore, this court will not consider that issue in this case as it is not ripe.

IV. Conclusion

For all of the reasons stated above, the court finds as follows: (1) the Plaintiffs' motion for summary judgment is **DENIED;** (2) the Defendants's motion for summary judgment is **GRANTED**; (3) the Plaintiff's Fourth Amendment claim under 42 U.S.C Sec. 1983 will be **DISMISSED WITH PREJUDICE**; and (4) the Plaintiffs' claim under the Indiana Constitution will be **DISMISSED WITHOUT PREJUDICE.** A judgment will be entered consistent with the terms of this entry.

ALL OF WHICH IS ORDERED this 2nd day of June 1997.

John Daniel Tinder, Judge
United States District Court

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8/96

RUSH COUNTY SCHOOLS
EXTRACURRICULAR ACTIVITIES DRUG TESTING PROGRAM

THE MISSION OF RUSH COUNTY SCHOOLS

Rush County Schools believes that the public school is to provide the best possible educational opportunities for all the youth of the community and for all adults who desire and want to pursue additional training or retraining. These opportunities must focus on the individual in terms of his/her interests, needs, abilities, and capacities. It is the goal of Rush County Schools to provide experiences which will equip the student to meet the responsibilities required of every citizen in our American democratic society. It shall also be the goal of the school to help the individual to acquire basic skills and attitudes necessary for him/her to live a full, productive, and satisfying life.

We also believe the school should make a concerted effort to affect ways of helping all individuals in human understanding and relations, tolerance, and respecting the dignity of a person. Ways must be found to help individuals strive for peace among nations, peoples, and cultures.

Since the schools are only one agency in a community contributing to the education of individuals, the school must join hands with the home and all community agencies and organizations to make a wholesome and healthful environment for all people.

INTRODUCTION

The effective date of this program is August 1, 1996. This

program does not affect the current policies, practices, or rights of Rush County Schools with drug and/or alcohol possession or use, where reasonable suspicion is obtained by means other than drug testing through this policy. Rush County Schools reserves the right to test any student who at any time exhibits cause for reasonable suspicion of drug and/or alcohol usage.

REASONABLE CONCERN

Rush County Schools has a strong commitment to the health, safety and welfare of its students. Results of studies throughout the United States, and an increased substance abuse problem in Rush County, Indiana, indicate that education alone, as a preventive measure, is not effective in combating substance abuse. Statistics show that the mission of Rush County Schools has not been realized. Our commitment to maintaining extracurricular activities in Rush County Schools as a safe and secure educational environment requires a clear policy and supportive programs relating to detection, treatment, and prevention of substance abuse by students involved in extracurricular activities.

PURPOSE

The drug testing program is not intended to be disciplinary or punitive in nature. Students involved in extracurricular activities need to be exemplary in the eyes of the community and other students. It is the purpose of this program to prevent students from participating in extracurricular activities while he/she has drug residues in his/her body, and it is the purpose of this program to educate, help, and direct students away from drug and alcohol abuse and toward a healthy and drug free participation. No student shall be expelled or suspended from school as a result of any verified "positive" test conducted by his/her school under this program other than stated therein.

SCOPE

Participation in extracurricular activities is a privilege. This policy applies to all Rush County Schools students in grades 9-12 who wish to participate in extracurricular activities that are listed in the current student handbook and any other school sponsored extracurricular activities not listed. It also includes any student who wishes to drive to school, from school, or during school.

LEGAL OBLIGATION

Indiana Code 20-8.1-7 sets forth health measures to be governed by school officials. Most specifically, IC 20-8.7-2 establishes the responsibility of schools to assist children found to be ill or in need of treatment.

DRUG EDUCATION

The sponsor or coach of each extracurricular activity will require the attendance of all prospective participants at one or more drug education sessions. Each prospective participant shall receive a copy of this policy and the policy will be explained to them at that time. An educational presentation will also be made to educate the students about the harmful effects and consequences of alcohol and other drug abuse. Students will receive information as to where they can seek professional help, if needed, for a use or abuse problem.

CONSENT FORM

It is MANDATORY that each student who participates in extracurricular activities sign and return the "consent form" prior to participation in any extracurricular activity. Failure to comply will result in non-participation.

Each extracurricular participant shall be provided with a "consent form", a copy of which is attached hereto, which shall be dated and signed by the participant and by the parent/guardian. In so doing, the student is agreeing to participate in the random drug testing program at Rushville Consolidated High School.

TESTING PROCEDURES

(1) The selection of participants to be tested will be done randomly by the principal/administrative designee, and selections will be made from time to time throughout the school year. Names will be drawn from one large pool of those agreeing to be tested. Testing may occur on a different day, Monday through Saturday. This variable schedule will keep students conscious of the possibility of being tested at any time during the year. Each student will be assigned a number that will be placed in the drawing.

(2) If the student shows signs of reasonable suspicion, the principal/administrative designee may call the student's parent/guardian and ask that the student be tested. Factors will include, but are not limited to, excessive discipline problems and/or excessive absences from school. Also, a parent/guardian may request testing of his/her student.

(3) No student will be given advance notice or early warning of the testing. In addition, a strict chain of custody will be enforced to eliminate invalid tests or outside influences.

(4) Upon being selected for a urinalysis test under this policy, either by random draw, reasonable suspicion, request of a parent/guardian, or a "follow-up" test, a student will be required to provide a sample of "fresh" urine according to the quality control standards and policy of the laboratory

conducting the urinalysis.

(5) All students will remain under school supervision until they have produced an adequate urine specimen. If unable to produce a specimen, the student will be given up to 24 ounces of fluid. If still unable to produce a specimen within two hours, the student will be taken to the principal's office and told he/she is no longer eligible for any of the extracurricular activities. In addition, the parents/guardian will be telephoned and informed the student is unable to produce a sample for the testing procedure and that he/she may be tested at a later date to be reinstated for eligibility.

(6) All specimens registering below 90.5 degrees or above 99.8 degrees Fahrenheit will be invalid. There is a heat strip on each of the specimen bottles indicating the validity of the urine specimen by temperature. If this occurs, another specimen must be given by the student.

(7) If it is proven that tampering or cheating has occurred during the collection, the student will become ineligible for all the "extracurricular activities" for the remainder of the school year. This will be reported to the parent/guardian.

(8) Immediately after the specimen is taken, the student may return to class with an admit slip or pass with the time he/she left the collection site. The principal/administrative designee must time and sign the pass.

(9) The specimens will then be turned over to the testing laboratory, and each specimen will be tested for alcohol, nicotine, and "street drugs" (which may include all drugs listed as controlled substances under the laws of the state of Indiana). Also "performance enhancing" drugs such as steroids may be tested.

(10) The laboratory selected must follow the standards set by the Department of Health and Human Services. It must be certified under the auspices of the Clinical Laboratory Improvement Act (CLIA) and the Joint Commission of Accreditation of Healthcare Organizations (JCAHO).

CHAIN OF CUSTODY

(1) The certified laboratory will provide training and direction to those who supervise the testing program, set up the collection environment, and guarantee specimens and supervise the chain-of-custody. To maintain anonymity, the student's number, not name, will be used.

(2) The principal/administrative designee will be responsible for escorting students to the collection site. The student should bring all materials with him/her to the collection site and should not be allowed to go to his/her locker. (The administrator should not bring all the students drawn from the pool to the collection site simultaneously. Calling four or five students at a time allows the collections to be carried out quickly and will not cause students to wait a long time, thereby creating a loss of important time from class. Athletes may be called after school, perhaps during practice time.)

(3) Before the student's urine is tested by the laboratory, students will agree to fill out, sign and date any form which may be required by the testing laboratory. If a student chooses, he/she may notify the administrator that he/she is taking a prescription medication.

(4) A sanitized kit containing a specimen bottle will be given to each student. The bottle will remain in the student's possession until a seal is placed upon the bottle. The student

will sign that the specimen has been sealed. The seal may be broken only by the lab testing the specimen.

(5) If the seal is tampered with or broken, after leaving the student's possession and prior to arriving at the lab, the specimen is invalid. The student will be called again as soon as possible. The student will remain eligible for extracurricular activities subsequent to a retest.

(6) The supervisor obtaining the urine specimen will be of the same gender as the student. Students will b instructed to remove all coats and wash their hands in the presence of the supervisor prior to entering the restroom. The door will be closed so that the student is by himself/herself in the restroom to provide a urine specimen. The supervisor will wait outside the restroom. The student will have two minutes to produce a urine specimen. The commode will contain a blue dye so the water cannot be used to dilute the sample. The faucets in the restrooms will be shut off.

(7) After it has been sealed, the specimen will be transported to the testing laboratory by lab personnel. The testing laboratory will report the results back to the principal/administrative designee.

(8) In order to maintain confidentiality, the container which contains the urine specimen to be tested will not have the name of the student on the container. Instead, the student's random identification number will appear on the container. Also the results sheet for the urinalysis will be mailed back to the principal/administrative designee with no name attached; only the student's random identification number will appear on the results sheet.

TEST RESULTS

(1) This program seeks to provide needed help for students who have a verified "positive" test. The students health, welfare, and safety will be the reason for preventing students from participation in extracurricular activities.

(2) The principal/administrative designee will be notified of a student testing "positive" (that is, if the test shows that the drug residues are in the student's system after using at least two different types of analyses). The principal/administrative designee will notify the student and his/her parent/guardian. The student or his/her parent/guardian may submit any documented prescription, explanation, or information which will be considered in determining whether a "positive" test has been satisfactorily explained.

In addition the student or parent/guardian may appeal by requesting that the urine specimen be tested again by the certified laboratory at a cost to the student or his/her parent/guardian.

(3) If the test is verified "positive", the principal/administrative designee will meet with the student and his/her parent/guardian at a school corporation facility. The student and parent/guardian will be given the names of counseling and assistance agencies that the family may want to contact for help. The student will be prevented from participating in extracurricular activities until after a "follow up" test is requested by the principal/administrative designee and the results are reported.

(4) A "follow up" test will be requested by the principal/administrative designee after such an interval of time that the substance previously found would normally have been eliminated from the body. If this "follow up" test is negative, the student will be allowed to resume extracurricular activities.

If a second "positive" result is obtained from the "follow up" test, or any later test of that participant, the same previous procedure shall be followed. In addition, the Rush County Schools reserves the right to continue testing at any time during the remaining school year any participating student who tested "positive" and did not make satisfactory explanation.

(5) Information on a verified "positive" test result will be shared on a "need to know" basis with the student's coach or sponsor. The results of "negative" tests will be kept confidential to protect the identity of all students being tested.

(6) Drug testing result sheets will be returned to the principal/administrative designee identifying students by number and not by name. Names of students will be locked and secured in a location that only the principal/administrative designee have access to.

FINANCIAL RESPONSIBILITY

(1) Under this policy, Rush County Schools will pay for all initial random drug tests, all initial reasonable suspicion drug tests, and all initial "follow up" drug tests. (Once a student has a verified "positive" test result and has subsequently tested negative from a "follow up" test, any future "follow up" drug test that must be conducted will be paid for by the student or his/her parent/guardian.

(2) A request on appeal for another test of a "positive" urine specimen is the financial responsibility of the student or his/her parent/guardian.

(3) Counseling and subsequent treatment by non-school agencies is the financial responsibility of the student or his/her parent/guardian.

CONFIDENTIALITY

Under this drug testing program, any staff, coach, or sponsor of Rush County Schools who may have knowledge of the results of a drug test will not divulge to anyone the results of the test or the disposition of the student involved, other than in the case of a legal subpoena being made upon that person in the course of a legal investigation. Once again, this will underscore the Rush County Schools commitment to confidentiality with regards to the program.

OTHER RULES

Apart from this drug testing program, Rushville Consolidated High School Athletic Association and the coaching staff/sponsor of each sport/activity have their own training rules and requirements. Coaches/sponsors have the necessary authority to enforce those rules. Any student who violates a rule or requirement as a member of a team or activity will be subject to the consequences as defined in those rules and requirements.

RUSH COUNTY SCHOOLS EXTRACURRICULAR CONSENT FORM

I have received and have read and understand a copy of the "Rush County Schools Extracurricular Activities Drug Testing Program." I desire that _____ participate in this program, and in the extracurricular program of Rush County Schools, and hereby, voluntarily agree to be subject to its terms for the entire high school career (grades 9 - 12). I accept the method of obtaining urine specimens, testing, and analyses of such specimen, and all other aspects of the program. I agree to cooperate in furnishing urine specimens that may be required from time to time.

I further agree and consent to the disclosure of the sampling, testing, and results provided for this program. This consent is given pursuant to all State and Federal Privacy Statutes, and is a waiver of rights to nondisclosure of such test records and results only to the extent of the disclosures in the program.

Date: _____, 19__

_____ _____

Student Signature Parent/Guardian Signature

****

I, _____, have decided not to participate in any extracurricular activities sponsored by Rush County Schools for the remainder of this school year. In order for me to participate in the extracurricular activity program at a later date, I understand, that I must submit to a urinalysis.

Student Signature	Date
Parent/Guardian Signature	Date